

ORIGINAL



0000154862

BEFORE THE ARIZONA CORPORATION COMMISSION

Arizona Corporation Commission

COMMISSIONERS

2014 JUN 23 P 2:09

DOCKETED

JUN 23 2014

BOB STUMP, Chairman
GARY PIERCE
BRENDA BURNS
BOB BURNS
SUSAN BITTER SMITH

DOCKETED BY

nr

In the matter of:

OUT OF THE BLUE PROCESSORS, LLC, an
Arizona limited liability company, d/b/a Out of
the Blue Processors II, LLC,

MARK STEINER (CRD# 1834102) and
SHELLY STEINER, husband and wife,

Respondents.

DOCKET NO. S-20837A-12-0061

**SECURITIES DIVISION'S POST-
HEARING BRIEF**

Hearing Dates: April 28 – May 1, 2014

**Assigned to Administrative Law
Judge Mark Preny**

The Securities Division ("Division") of the Arizona Corporation Commission ("Commission") submits its Post-Hearing Brief ("Brief") with respect to the administrative hearing held on April 28 – May 1, 2014. This Brief is supported by the following Memorandum of Points and Authorities.

MEMORADUM OF POINTS AND AUTHORITIES

I. Jurisdiction

The Commission has jurisdiction over this matter pursuant to Article XV of the Arizona Constitution and the Securities Act. As stated in A.R.S. § 44-2032, the Commission has jurisdiction when it appears to the Commission that any person has engaged in any act, practice or transaction that constitutes a violation of the Securities Act or any rule or order of the Commission. If there is an unregistered, non-exempt offer or sale of securities within or from Arizona, or any fraud in connection with that offer or sale, that is a potential violation of the Securities Act and subject to the Commission's jurisdiction.¹

¹ A.R.S. §§ 44-2032(1), 44-1841, -1842 & -1991.

1 **II. FACTS**

2 **A. Overview and Stipulated Facts**

3 This case involves the sale of LLC membership interests in Out of the Blue Processors,
4 LLC, a manager-managed LLC, which also used the name "Out of the Blue Processors II, LLC"
5 ("OBP").² OBP sold the membership interests in two waves, which will be referred to as "Blue I"
6 and "Blue II." The sales occurred pursuant to two, almost-identical operating agreements, which
7 will be referred to as the "Operating Agreements."³ The Securities Division alleged in its TC&D⁴
8 and Notice,⁵ and stipulated facts and evidence presented at hearing establish, that the membership
9 interests are securities and that Respondents offered and sold the membership interests in violation
10 of three provisions of the Arizona Securities Act (the "Securities Act").

11 The first provision, A.R.S. § 44-1841(A) makes it unlawful for Respondents to offer or sell
12 securities unless the securities are registered with the Commission or are exempt from the
13 registration requirements of the Securities Act. The person claiming the exemption has the burden
14 of proving it.⁶

15 It is undisputed that Respondents sold unregistered securities. Prior to the hearing,
16 Respondents stipulated that the membership interests were securities in the form of investment
17 contracts,⁷ that these securities were sold within and from Arizona,⁸ and that the securities were
18 not registered with the Commission.⁹ The Division provided certification that further established
19 that the Respondents did not register the limited liability company membership interests with the
20 Commission.¹⁰

21 Respondents' second violation of the Securities Act is pursuant to A.R.S. § 44-1842 which

22 ² Joint Fact Stipulations, ¶ 3, filed in Docket No. S-20837A-12-0061 on 4/28/14 ("Fact Stip.").

23 ³ Fact Stip. ¶ 10; *see also* Exs. S-11, S-71 & S-72.

24 ⁴ Temporary Order to Cease and Desist and Notice of Opportunity for Hearing, filed February 22, 2012.

25 ⁵ Amended Notice of Opportunity for Hearing Regarding Proposed Order to Cease and Desist, Order for Restitution,
26 Order for Administrative Penalties, Order of Revocation, and Order for other Affirmative Action, filed September 6,
2013.

⁶ A.R.S. § 44-2033.

⁷ Fact Stip. ¶ 11.

⁸ Fact Stip. ¶ 11.

⁹ Fact Stip. ¶¶ 10 & 12.

¹⁰ Exs. S-2, S-3 & S-4.

1 requires Respondents to be individually registered as securities dealers or salesmen with the
 2 Commission. Again, the elements of this violation are undisputed: Respondents stipulated that
 3 they were not registered securities dealers or salesmen with the Commission while they were
 4 offering and selling securities within or from Arizona.¹¹ The Division provided certifications that
 5 further established that the Respondents and their related entities were not registered as securities
 6 dealers or salesmen with the Commission.¹²

7 Third, the Division alleged in the Notice and established at hearing that Respondents
 8 violated A.R.S. § 44-1991(A)(2), one of the anti-fraud provision of the Securities Act, by using
 9 investor funds for personal expenses in contradiction of representations made to investors.
 10 Subsequent to filing the Notice, the Division discovered that OBP continued to offer and sell
 11 interests after the Division issued the TC&D. OBP's failure to disclose the TC&D to the buyers
 12 constitutes an additional violation of A.R.S. § 44-1991(A)(2).

13 **B. Respondents sold securities to pay for operating costs of their purported business.**

14 OBP is an Arizona limited liability company organized on December 18, 2000.¹³ OBP's
 15 Operating Agreements state that OBP's principal place of business is located in Mesa, Arizona.¹⁴

16 As stated in OBP's articles of organization filed with the Commission, OBP is a manager-
 17 managed LLC; Respondent Mark Steiner and his wife, Shelly Steiner, are the managers.¹⁵

18 According to OBP's Operating Agreements, Steiner is the manager of OBP.¹⁶ The manager
 19 has the general powers to employ and dismiss from employment; invest company funds; execute
 20 all documents on behalf of the company as the manager deems appropriate in carrying out the
 21 purpose of the company; reimburse himself for expenses incurred in the conduct of OBP's
 22 business; and pay any ordinary and necessary expenses of the company. The manager can only be
 23 removed for "cause."¹⁷

24 ¹¹ Fact Stip. ¶¶ 5, 9, 11 & 13.

25 ¹² Exs. S-1, S-2, S-3 & S-4.

¹³ Ex. S-7; Fact Stip. ¶ 2; H.T. pp. 35:1 – 36:7.

¹⁴ Exs. S-11, S-71 & S-72.

¹⁵ Ex. S-7; Fact Stip. ¶ 4.

¹⁶ Exs. S-11, S-71 & S-72.

¹⁷ *Id.*

1 At all times relevant, Steiner, CRD# 1834102, has been an Arizona resident.¹⁸ Steiner was
 2 once a registered securities salesman; but he has not been a registered securities salesman with the
 3 Commission since April 13, 2005.¹⁹

4 Shelly Steiner has been at all relevant times the spouse of Steiner and an Arizona resident.²⁰
 5 Ms. Steiner may be referred to as “Respondent Spouse.” (She has been joined in this action under
 6 A.R.S. § 44-2031(C) solely for purposes of determining the liability of the Steiners’ marital
 7 community.)

8 Steiner is also a manager of Lunsford Consulting, LLC, an Arizona limited liability.²¹ The
 9 other manager of Lunsford Consulting is William Lunsford.²² Mr. Lunsford died in April 2013.²³

10 As set forth in the “Private Placement Agreement” between OBP and Lunsford Consulting,
 11 dated March 25, 2008, which Steiner executed on behalf of both OBP and Lunsford Consulting
 12 (the “PPA”), Lunsford Consulting is in the business of “acting as an intermediary for various
 13 Chinese interests...for the purpose of identifying, documenting, and securing funding for...projects
 14 [controlled by these Chinese interests].”²⁴

15 Lunsford Consulting’s success—and, consequently, OBP’s success—was based on Mr.
 16 Lunsford’s unique relationships with “very senior officials” in China.²⁵ Steiner testified at hearing
 17 that, without Lunsford’s relationships, there was no foundation to what Lunsford Consulting and
 18 OBP were doing.²⁶ OBP’s “Executive Summary”²⁷ further emphasizes the company’s complete
 19 dependence on its principals for its success: “Mr. Lunsford has been doing business with the
 20 Chinese for more than 21 years. His unique approach to business and his strong relationships with
 21 senior Central Government officials has afforded a unique opportunity to develop business
 22

23 ¹⁸ Fact Stip. ¶ 1.

24 ¹⁹ Fact Stip. ¶ 5.

25 ²⁰ Ex. S-8 at ACC000987.

26 ²¹ Ex. S-5.

27 ²² *Id.*

28 ²³ H.T. 565:20 – 22.

29 ²⁴ Ex. S-20.

30 ²⁵ H.T. 543:23 – 544:15.

31 ²⁶ H.T. 544:23 – 545:8.

32 ²⁷ Ex. S-12.

1 throughout the world....[I]n China, *the* recipe [for success] is ‘Quanxi, Quanxi, Quanxi’
 2 (pronounced like kwan-she). Quanxi means contacts, relationships, networks and connections.
 3 Lunsford has Quanxi.”²⁸

4 Using Mr. Lunsford’s relationships, Steiner and Lunsford, acting through Lunsford
 5 Consulting, would provide services necessary to bring projects to fruition, such as introducing the
 6 government officials, contractors, and financiers to each other. In exchange for these services,
 7 Lunsford Consulting would receive revenue from a percentage of project funding, monthly revenue
 8 from ongoing sales transactions, and from potential equity positions in the projects.²⁹

9 As stated in the PPA, OBP’s role was to raise capital to fund Lunsford Consulting’s
 10 operations, for which OBP would receive a portion of the consulting fees that Lunsford Consulting
 11 generated.³⁰ Lunsford Consulting would pay 10% of its gross revenues, less any commissions or
 12 fees, to OBP in exchange for \$1,500,000 of capital raised until principal is returned, then 5% in
 13 perpetuity thereafter. If Lunsford Consulting required additional capital, Lunsford Consulting
 14 would pay an additional 5% of its Gross Revenue, less any commissions or fees, to OBP in
 15 exchange for up to \$750,000 until principal is returned, then 2.5% in perpetuity thereafter.³¹

16 These payment terms are also set out in the “Division of Profits and Losses” section of
 17 OBP’s Operating Agreements. The Operating Agreements further explain that OBP will distribute
 18 the revenue it receives from Lunsford Consulting to the Blue I and Blue II investors according to
 19 each investor’s percentage ownership.³²

20 OBP sold membership interests to Blue I and Blue II investors in the two waves described
 21 in the PPA.³³ During the first wave, which occurred between approximately June 2008 and
 22 summer 2011, 28 Blue I investors purchased membership interests in OBP for a total of
 23

24
 25 ²⁸ *Id.*, emphasis in original.

²⁹ *Id.*

³⁰ Ex. S-20.

³¹ *Id.*

³² Ex. S-71, ¶ 6.2 at ACC005026; Ex. S-11, ¶ 6.2 at ACC001090; Ex. S-72.

³³ *See, e.g.*, Fact Stip. ¶¶ 10 & 11.

1 \$1,773,000; three of these investors contributed an additional \$90,000 total.³⁴ In the second wave,
 2 beginning in approximately summer 2011, and continuing throughout 2013, nine Blue II investors
 3 purchased OBP membership interests for a total of \$577,500; two of these investors contributed an
 4 additional \$55,000 total.³⁵

5 In exchange for their investment, Blue I and Blue II investors received percentage interests
 6 in OBP, documented by membership certificates showing their respective percentage interest.³⁶
 7 They also received copies of the Operating Agreements, which showed each investor's interest.³⁷

8 Steiner was the OBP representative who offered and sold the investment to the investors.
 9 Mr. Steiner testified to meeting with the investors listed in Exhibit S-19.³⁸ Additionally, Ms.
 10 Flowers stated that she learned of the investment through Steiner.³⁹ Mr. Clay testified that it was
 11 Steiner who explained and sold the investment to him.⁴⁰ Mr. McLaughlin testified that he met with
 12 Steiner several times before investing, and that Mr. Steiner provided an operating agreement and
 13 other documents, and explained to him how investors would be paid from OBP's profits.⁴¹ Mr.
 14 Laney explained that he learned of the investment and the payment structure through Steiner.⁴²
 15 Ms. Painter testified it was Steiner who provided her with information about OBP.⁴³

16 The offer was available to anyone who asked Steiner about it. As shown in Respondents'
 17 documentation of their investors, of the 28 Blue I investors, 15 did not have a pre-existing
 18 relationship with any of the Respondents.⁴⁴ Of these 15, 13 were referred to Steiner through
 19 "another participant" while two of the 15 were gifted their interests by another interest owner.⁴⁵

20
 21 ³⁴ Ex. S-13, S-19 & S-38; H.T. 118:14 – 119:15; as discussed below, two investors listed in S-13 & S-19 were gifted
 22 their interests, however, two other investors not listed in S-13 & S-19 received returns of their principal; Steiner gave
 no explanation about why OBP sold \$1,773,000 when it had agreed to sell \$1.5M, or as to how this overselling would
 affect payments to Blue I investors.

23 ³⁵ Ex. S-19 & S-39.

24 ³⁶ Exs. S-38 & S-39; H.T. pp. 68:7 – 70:2.

25 ³⁷ Exs. S-11, S-71 & S-72; *see also* Fact Stip. ¶ 10.

26 ³⁸ H.T. beginning at 484:11.

³⁹ H.T. 197:5 – 13.

⁴⁰ H.T. 244:3 – 19.

⁴¹ H.T. 354:3 – 355:6.

⁴² H.T. 377:8 – 378:15.

⁴³ H.T. 406:20 – 24.

⁴⁴ Ex. S-13.

⁴⁵ *Id.*

1 Two witnesses confirmed their lack of a pre-existing relationship with Steiner or OBP. Blue II
 2 investor, Roberta Flowers, testified at hearing that a third party introduced her to Steiner for the
 3 purpose of discussing the investment and that she had no pre-existing relationship with Steiner or
 4 OBP.⁴⁶ Ms. Painter testified that she was introduced to Steiner for the purpose of talking about
 5 investing in OBP.⁴⁷ During his testimony, Steiner confirmed that the following investors were all
 6 referred to him by third parties for the purpose of discussing investing in OBP: Southridge
 7 Investments/Overall Plumbing,⁴⁸ Robert Kocks,⁴⁹ Rolle Hogan,⁵⁰ Patricia Riddle and Sylvia
 8 Anderson,⁵¹ Will Law,⁵² Sue Painter,⁵³ Ronald Kocks,⁵⁴ Gmelich Family Trust,⁵⁵ Raymond Flores
 9 and Rebecca Flowers,⁵⁶ Duke Cowley,⁵⁷ and Barbara Moore.⁵⁸

10 Respondents represented that 23 of the 28 Blue I investors were “understood to be
 11 accredited investors.”⁵⁹ But Respondents provided no documentation in which any investor
 12 represented that s/he was accredited. At hearing, the closest Respondents came to explaining their
 13 “understanding” of accreditation for these investors and the Blue II investors was when Steiner
 14 described the past employment, houses, neighborhoods, and lifestyles of certain investors.⁶⁰ The
 15 inaccuracy of such guesswork became apparent through witness testimony. Ms. Flowers testified
 16 that Respondents did not inquire as to her or her father’s net worth or income at the time they
 17 invested, and that at the time they invested she did not meet the definition of an accredited
 18 investor.⁶¹ Mr. Clay also testified that he did not meet the definition of an accredited investor at
 19 the time he invested, nor did Steiner or any OBP employee inquire as to Mr. Clay’s income and net

20 ⁴⁶ H.T. 196:21 – 197:7.

⁴⁷ H.T. 405:6 – 8.

21 ⁴⁸ H.T. 488:22 – 489:7.

⁴⁹ H.T. 489:23 – 490:4.

22 ⁵⁰ H.T. 495:7 – 11.

⁵¹ H.T. 495:23 – 496:1.

23 ⁵² H.T. 496:7 – 9.

⁵³ H.T. 497:9 – 15.

24 ⁵⁴ H.T. 499:16 – 24.

⁵⁵ H.T. 500:14 – 24.

⁵⁶ H.T. 501:6 – 12.

25 ⁵⁷ H.T. 503:5 – 6.

⁵⁸ H.T. 504:11 – 14.

26 ⁵⁹ Ex. S-13.

⁶⁰ H.T. beginning at 484:11.

⁶¹ H.T. pp. 210:19 – 212:16.

1 worth.⁶² Mr. McLaughlin testified that Respondents did not ask him if he was accredited or ask
 2 questions about his net worth.⁶³ Mr. Laney also testified that, prior to investing, no one at OBP
 3 asked him about his income, net worth, or whether he was accredited.⁶⁴ Similarly, at the time Ms.
 4 Painter invested, Steiner failed to ask her what her net worth and annual income was.⁶⁵
 5 Additionally, Steiner testified that he did not believe that Mr. McLaughlin was accredited.⁶⁶

6 OBP's primary ongoing duties (after raising the capital), according to Steiner, were to
 7 update investors on potential revenue sources and distribute profits to investors.⁶⁷ Investors did not
 8 have day-to-day input or control of OBP nor did they have any direct interactions related to the
 9 projects involving China and other countries.⁶⁸ As a manager and executive of these entities, Steiner
 10 failed to keep any accounting or other records on behalf of the companies.⁶⁹

11 To date, the investors listed on Exhibit S-19 (for which the Division is seeking restitution)
 12 have not received any profits or returns of their principal from Respondents.⁷⁰

13 **C. Offer and Sale to Additional Arizona Resident**

14 In January 2012, a Division investigator, under the alias Margo Mallamo, an Arizona
 15 resident ("MM"), reviewed an email tip that local financial planner, Mr. Rolf Heartburg, was
 16 pitching investing in OBP. MM contacted Mr. Heartburg, who gave MM Steiner's contact
 17 information. MM then emailed Steiner, with an email titled "Investment," saying she was
 18 interested in the investment.⁷¹

19 On January 9, 2012, MM received an email from Steiner that stated:

20 "I appreciate your interest in our business relationship with China In
 21 short, we are structured as an LLC, with investors owning their relative
 22 portion of that LLC. The LLC contractually receives 10% of the gross

23 ⁶² H.T. pp. 238:10 – 239:19.

⁶³ H.T. pp. 371:4 – 18.

⁶⁴ H.T. 391:2 – 392:15.

⁶⁵ H.T. 406:25 – 407:5 & 422:4 – 23.

⁶⁶ H.T. 486:4 – 11.

⁶⁷ H.T. 516:12 – 19.

⁶⁸ H.T. 262:14 – 21, 271:4 – 7.

⁶⁹ H.T. 48:15 – 54:6; Exs. S-22, S-23, S-24, S-25, S-40, S-41, S-42, & S-43.

⁷⁰ H.T. 559:1 – 560:18.

⁷¹ Ex. S-37 at ACC000322-325; H.T. 42:11 – 43:7 & 44:5 – 17.

1 revenues generated on all business out of China, in perpetuity. Because of
2 the magnitude of the projects, those returns are expected to exceed 50% -
3 100% annually.”⁷²

4 In continued email correspondence, MM and Steiner discussed an investment amount of
5 approximately \$200,000 – \$250,000.⁷³ On January 19, 2012, Steiner emailed MM. The Lunsford
6 Executive Summary⁷⁴ and Blue II Operating Agreement were attached to that email. The email
7 also included wiring instructions for an OBP bank account.⁷⁵

8 The Blue II Operating Agreement sent to MM and signed by Steiner, lists MM as a
9 Member of OBP with a 33.33% interest—which is consistent with a \$250,000 investment (i.e.
10 \$250,000 out of a \$750,000 offering).⁷⁶ This Operating Agreement describes how MM and other
11 Blue II investors would be paid: in exchange for OBP’s raising \$750,000 of operating capital for
12 Lunsford Consulting, LLC, OBP will get 5% of Lunsford Consulting’s gross revenue until the
13 investment is returned then receive 2.5% of Lunsford Consulting’s gross revenues in perpetuity.⁷⁷

14 On February 14, 2012, MM received a communication from Steiner stating that he would
15 like to meet to discuss “this China Investment Opportunity.”⁷⁸ By late February, Steiner and MM
16 had arranged a time and location where they could meet and MM could give Steiner the check for
17 her investment.⁷⁹ Thus, Steiner had discussed the investment opportunity in great detail with MM,
18 discussed how she could pay for it, provided her with a written document showing a \$250,000
19 purchase price for her investment, and arranged a time for her to pay for the investment.

20 MM was not an accredited investor and during all of their correspondence Steiner never
21 asked MM if she was an accredited investor or inquired about her relevant level of sophistication.⁸⁰
22 Ultimately, MM did not invest in the Blue II Offering.

23 ⁷² Ex. S-37 at ACC000325; *see also* Steiner testimony, H.T. 5:36:23 – 537:16.

24 ⁷³ Ex. S-37 at ACC000327.

25 ⁷⁴ Ex. S-12.

26 ⁷⁵ Ex. S-37 at ACC000333; H.T. 43:8 – 11; Ex. S-11.

⁷⁶ Ex. S-11; H.T. 560:19 – 561:13.

⁷⁷ *Id.* at ACC001090.

⁷⁸ Ex. S-37 at ACC000351.

⁷⁹ Ex. S-37 at ACC000355; H.T. 43:22 – 44:4.

⁸⁰ H.T. 43:12 – 21 & 102:9 – 103:10; Ex. S-37.

D. Steiner's use of investor funds for personal expenses.

Steiner told several investors that their monies were only to be used for business expenses to travel and entertain certain influential Chinese individuals related to the investment and not to pay Steiner a salary or commission, or to pay for expenses unrelated to OBP's business. Ms. Flowers testified that based on her conversations with Steiner she expected her investment funds to be used to cover travel expenses necessary to get the interested parties to sign infrastructure contracts, and as some of the investment towards the infrastructure project.⁸¹ Ms. Flowers further testified that she did not expect her funds to go to any other purpose and that she probably would not have invested had she known that her investment would be used for Steiner's personal expenses.⁸² Respondents' witness, Mr. McLaughlin, testified that he understood that investor funds would be used to "facilitate the [working] projects as far as funding operation, costs" on the projects that Lunsford Consulting was working on.⁸³

Additionally, OBP's Operating Agreements—which witnesses Mr. Gilman,⁸⁴ Ms. Flowers and Mr. Flores,⁸⁵ Mr. McLaughlin,⁸⁶ and Mr. Laney⁸⁷ all testified that they received—state that OBP's manager (i.e. Steiner) will only be paid out of gross revenues.⁸⁸ Since OBP was to make its revenues from Lunsford Consulting,⁸⁹ and since OBP had not received any revenues,⁹⁰ payment to the manager for personal expenses is in contradiction to the terms of the Operating Agreements and the expectations of a reasonable investor based on those Operating Agreements. In spite of these representations, Steiner used investor funds for expenses not related to operating costs, including personal expenses.

⁸¹ H.T. 207:16 – 208:3 & 209:4 – 25.

⁸² H.T. 212:18 – 22.

⁸³ H.T. 352:21 – 353:25.

⁸⁴ H.T. 263:1 – 9.

⁸⁵ Ex. S-71; H.T. 204:23 – 205:9; *see also* Exs. S-11, S-71 & S-72.

⁸⁶ Ex. S-71; H.T. 356:16 – 358:24.

⁸⁷ Ex. 71; H.T. 385:24 – 387:1.

⁸⁸ Exs. S-11, S-71 & S-72 at ¶ 3.6.

⁸⁹ *Id.* at ¶ 6.2.

⁹⁰ H.T. 560:10 – 18.

Between August 25, 2010, and November 30, 2010, all deposits in OBP's bank account came from investors.⁹¹ On August 25, 2010, a bank account held in the name of OBP, on which account Steiner is the sole signatory, had a beginning balance of \$0.⁹² That same day, \$100,000 from two investors was deposited into the account. The only other material deposit during this time frame occurred on October 1, 2010, for \$49,543, and the source of that deposit was also investor funds.⁹³

During this time, on at least two occasions, Steiner used OBP's accounts to pay then-existing investors. On December 8, 2010, Steiner made a \$20,000 from OBP's account to an investor, Ms. Wooten.⁹⁴ On that same date, December 8, 2010, Steiner made a \$5,000 payment to another investor, Mr. Gleason.⁹⁵ Funds obtained from Blue I investors were used to make these payments.⁹⁶

Steiner also used investor funds to pay off a personal loan. In October 2010, an individual made a \$15,000 loan to Steiner and his wife. On October, 4, 2010, the lender transferred \$15,000 into Steiner's personal account. On October 19, 2010, Steiner used OBP investor funds to make an \$18,750 payment from OBP's account to the lender.⁹⁷

Steiner transferred a total of \$71,930 to his entity Second Opinion Solutions.⁹⁸ This is, in effect, a transfer to himself: Steiner is the manager of Second Opinion Solutions⁹⁹ and during the hearing Steiner described the entity as representing his personal interests and as being the equivalent to him personally.¹⁰⁰ The \$71,930 transferred to Second Opinion Solutions was used to pay Steiner's personal expenses. For example, on October 7, Second Opinion Solutions purchased

⁹¹ Exs. S-32a, S-32a-1, S-32a-2, S-32a-3 & S-46; H.T. 170:2 – 171:23; H.T. 172:1 – 180:24.

⁹² Exs. S-46 & S-48; H.T. 172:1 – 180:24.

⁹³ Ex. S-49 & S-51; H.T. 176:2 – 177:2.

⁹⁴ Ex. S-35; H.T. 120:6 – 121:20 & 146:20

⁹⁵ Ex. S-62; H.T. 124:14 – 125:21.

⁹⁶ Ex. S-60a; H.T. 146:20 – 149:17.

⁹⁷ Exs. S-33, S-34 & S-54a; H.T. 121:21 – 124:13.

⁹⁸ Ex. S-46; Ex. S-56 at ACC000561; H.T. 144:16 – 145:12.

⁹⁹ Ex. S-6.

¹⁰⁰ H.T. 527:5 – 7 & 528:21.

1 a cashier's check bearing the notation "RE: LEASE AGREEMENT" and made payable to the
2 owner of the house at which Steiner resided.¹⁰¹

3 Steiner also withdrew a total of \$23,400 in cash between August 25, 2010, and November
4 30, 2010.¹⁰² Steiner vaguely described that the cash was used for business expenses,¹⁰³ but failed
5 to provide any specifics or any documentation for any of these withdrawals.¹⁰⁴

6 Another \$20,000 of investor funds was transferred to a personal account held in the name of
7 Steiner and Respondent Spouse.¹⁰⁵ And Steiner used OBP funds to pay for his personal credit card.¹⁰⁶
8 By November 30, 2010, the ending balance of OBP's account was \$922.¹⁰⁷

9 Steiner was the sole signatory on each entity's bank account.¹⁰⁸ And Steiner and
10 Respondent Spouse were the only signatories on the personal account reviewed by Division
11 witness, Forensic Accountant, Ricardo Gonzales.¹⁰⁹

12 **E. Steiner failed to disclose the Division's TC&D to Blue II investors.**

13 Steiner offered and sold the Blue II investment to three investors after the Division filed the
14 TC&D on February 22, 2012. Ms. Flowers testified that she and Mr. Flores met with Steiner after
15 February 2012,¹¹⁰ and purchased the investment in September 2012.¹¹¹ Mr. Clay testified that he
16 talking with Mr. Lunsford and Mr. Steiner about the investment during 2012 and purchased his
17 investment in November 2013.¹¹² Steiner did not disclose the TC&D to Ms. Flowers and Mr.
18 Flores¹¹³ or to Mr. Clay.¹¹⁴

20 ¹⁰¹ Ex. S-57; H.T. 145:13 – 146:17.

21 ¹⁰² Exs. S-32a, S-32a-1, S-32a-2, S-32a-3 & S-46; H.T. 170:2 – 171:23; H.T. 172:1 – 180:24.

22 ¹⁰³ Ex. S-32.

23 ¹⁰⁴ H.T. 170:20 – 171:5.

24 ¹⁰⁵ Ex. S-46, ACC000461 – 472.

25 ¹⁰⁶ H.T. 143:20 – 144:7.

26 ¹⁰⁷ *Id.* at ACC000461.

¹⁰⁸ Ex. S-14 & H.T. 114:4 – 115:5; Ex. S-15 & H.T. 115:6 – 116:2; Ex. S-16 & H.T. 116:3 – 22; Ex. S-18 & H.T. 117:9 – 117:8.

¹⁰⁹ Ex. S-17 & H.T. 116:23 – 117:8.

¹¹⁰ H.T. 197:11 – 19.

¹¹¹ H.T. 200:22 – 201:8 & 204:13 – 18.

¹¹² H.T. 234:7 – 20 & 237:17 – 19.

¹¹³ H.T. 213:2 – 214:1.

¹¹⁴ H.T. 239:20 – 240:19.

1 **IV. Legal Argument**

2 The Division established at hearing that during the years 2008 – 2013, Respondents
3 repeatedly offered and sold investment contracts in the form of LLC membership interests issued
4 by OBP. The investment contracts fall squarely within the definition of securities under the
5 Securities Act.

6 **A. The LLC membership interests are securities in the form of investment contracts.**

7 Respondents stipulated that the OBP membership interests were securities in the form of an
8 investment contract. This stipulation is in accordance with Arizona law. In *Nutek Info Sys., Inc. v.*
9 *Arizona Corp. Comm'n*, the Arizona Supreme Court held that membership interests in an LLC
10 satisfy the elements of the test set forth in *S.E.C. v. W.J. Howey Co.* and are securities where the
11 management structure of an LLC prevents the members from exercising effective control of the
12 LLC.¹¹⁵ In *Nutek*, the LLC members of a member-managed LLC signed a management agreement
13 that turned overall principal management functions to another party.¹¹⁶ Members had “little to no
14 input” on the agreements that the LLC entered into.¹¹⁷ Additionally, the court found that the
15 members could not exercise effective control of the business as a practical matter because of the
16 large number of geographically disbursed members.¹¹⁸ *Nutek* also found it significant that the
17 members lacked the technical expertise to operate the business.¹¹⁹

18 Here, the OBP investors were members of OBP, a *manager*-managed LLC, which
19 controlled the use and spending of investor funds. The manager, i.e. Steiner, handled the day-to-
20 day operations. The OBP investors had no legal rights to exercise control of their funds or
21 operations of the business. And, while members of OBP, they did not in fact exercise any control:
22 Steiner presented no evidence that OBP ever held any membership meetings or put any matters to
23 a vote of the members. Finally, the members lacked the experience and meaningful relationships

24
25 ¹¹⁵ 194 Ariz. 104, 108-110, 977 P.2d 826, 830-32 (App. 1998); citing *S.E.C. v. W.J. Howey Co.*, 328 U.S. 293, 298 (1946).

26 ¹¹⁶ 194 Ariz. at 109-110, 977 P.2d at 831-832.

¹¹⁷ *Id.* at 110, 832.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

1 with Chinese officials required to operate the business. Consequently, the OBP investors had even
 2 less control of their investment than the *Nutek* investors. As a result, under the standards of *Nutek*,
 3 the OBP membership interests are securities.

4 As a result of the stipulations and conformance to established law, the OBP membership
 5 interests constitute securities in the form of investment contracts.

6 **B. Respondents presented no evidence that an exemption to A.R.S. § 44-1841 applies.**

7 As investment contracts being sold within or from Arizona, the OBP membership interests
 8 were required to be registered unless they are exempt from registration.¹²⁰ Under the Securities Act,
 9 A.R.S. § 44-2033, the burden of establishing an exemption from registration is upon the party
 10 claiming it. During hearing, Respondents presented no evidence that they met any exemptions from
 11 registration, much less showed that they strictly complied with all the requirements of a specific
 12 exemption.¹²¹

13 **C. Respondents will not be able to establish federal preemption of A.R.S. § 44-1841**

14 Federal securities law preempts state securities regulation requirements only in very specific
 15 circumstances. Under Section 18 of the federal Securities Act of 1933, securities that are exempt
 16 from registration with the SEC under rules or regulations issued under Section 4(a)(2) of the
 17 Securities Act of 1933—the exemption for private offerings—are exempt from state registration
 18 requirements, other than notice-filing requirements.¹²² The SEC issued Regulation D under Section
 19 4(a)(2). Rule 506 of Regulation D¹²³ is a “safe harbor” for private offerings: if an issuer complies
 20 with all requirements of this rule, it will be deemed to have met the requirements for the section
 21 4(a)(2) private placement exemption.

22 During the hearing, Respondents’ counsel stated that “Rule 506” applies to the offers and
 23 sales of the OBP membership interests that are the subject of this hearing, and thus preempts the
 24

25 ¹²⁰ A.R.S. § 44-1841.

26 ¹²¹ See *State v. Baumann*, 125 Ariz. 404, 411, 610 P.2d 38, 45 (1980) (en banc) (“Because of the vital public policy underlying the registration requirement, there must be strict compliance with all the requirements of the exemption statute.”)

¹²² 15 U.S.C. § 77r(b)(4)(D); A.R.S. § 44-1843.02(C).

¹²³ 17 C.F.R. 230.501 et seq.

1 Arizona registration requirements.¹²⁴ Respondents bear the burden of demonstrating that federal law
 2 preempts Arizona law.¹²⁵ Their claim of preemption must “overcome the assumption that a federal
 3 law does not supersede the historic police powers of the state.”¹²⁶ Merely purporting to sell under
 4 Rule 506 of Regulation D does not preempt state law.¹²⁷ Respondents must also show that they fully
 5 complied with the requirements of the rule.¹²⁸ A failure to comply with the requirements of Rule 506
 6 voids the exemption, thereby eliminating the possibility of preemption.¹²⁹ Moreover, Respondents
 7 sold the securities, prior to the September 23, 2013, when Regulation D prohibited general advertising
 8 and solicitation in a Rule 506 offering.¹³⁰

9 No evidence in this case exists to support federal preemption. On the contrary, the evidence at
 10 hearing shows that Respondents will not be able to meet some of the basic requirements of Rule 506
 11 of Regulation D. Notably, Respondents also offered and sold securities to several persons with whom
 12 they did not have an established, business relationship and Respondents failed to provide any
 13 evidence that each investor and offeree met the requirements of sophistication or accreditation.
 14 Respondents presented no evidence that they filed the required forms with the SEC (nor that they
 15 made the required notice filing of their SEC filings with Arizona).¹³¹ Because Respondents did not
 16 meet all the requirements of Regulation D, they will not be able to claim federal preemption of
 17 Arizona registration requirements.

18 **D. Respondents cannot avoid liability under A.R.S. § 44-1991 with an**
 19 **exemption/preemption of the registration provisions of the Securities Act.**

20 Registration exemptions and federal preemption are inapplicable to the antifraud rules
 21 contained in both federal and Arizona securities laws.¹³² Thus, even if the OBP securities were

22 ¹²⁴ H.T. 254:6 – 20.

23 ¹²⁵ *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984).

24 ¹²⁶ *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157 (1978).

25 ¹²⁷ *Grubka v. Webaccess Int'l, Inc.*, 445 F. Supp. 2d 1259, 1271 (D. Colo. 2006).

26 ¹²⁸ 17 C.F.R. § 230.501 et seq.

¹²⁹ *Buist v. Time Domain Corp.*, 926 S.2d 290, 298 (Ark. 2005).

¹³⁰ <http://www.sec.gov/rules/final/2013/33-9415.pdf>

¹³¹ 15 U.S.C. § 77r(c); A.R.S. § 44-1843.02(C).

¹³² See e.g. 15 U.S.C. § 77r(c); *Little v. First California Co.*, 1977 WL 1054 (D. Ariz. 1977) (“Even though bank securities are exempt from the registration requirements of the 1933 Act, transactions in bank securities are not exempt from the anti-fraud provisions of either the 1933 Act or the 1934 Securities Exchange Act.”); A.R.S. § 44-1991;

1 exempt from registration—which they are not—they are not exempted from the antifraud provisions
2 of A.R.S. § 44-1991.

3 **E. OBP and Steiner’s lack of dealer/salesmen registration violated A.R.S. § 44-1842.**

4 A.R.S. § 44-1842 requires that a person who sells or offers to sell securities in or from
5 Arizona must be registered as a dealer or salesman with the Commission. Furthermore, the
6 preemption provisions of Section 18 of the Securities Act of 1933 does not apply to dealer or
7 salesman registration requirements.¹³³ The stipulations by Respondents, and the evidence produced at
8 hearing (including certificates of non-registration), established that OBP and Steiner violated A.R.S. §
9 44-1842 by selling securities in numerous offers and sales while not being registered to sell securities.

10 **F. Respondents offered to sell securities to MM.**

11 The Securities Act defines “offer to sell” and “offer for sale” quite broadly. These terms are
12 defined as “an attempt or offer to dispose of, or a solicitation of an order or offer to buy, a security or
13 interest in a security....”¹³⁴ These definitions are identical to those in the Federal Securities Act.¹³⁵
14 Thus interpretations of the Federal Act are relevant to interpreting the Arizona definitions.
15 Commentators have noted that even a casual reading of these definitions of “offer” indicates that they
16 are much broader than the common-law contracts’ definitions of these terms.¹³⁶ Merely generating
17 interest in the securities by discussing them publicly may constitute making an offer.¹³⁷

18 Significantly, courts have held that allowing an investor to take materials describing the
19 investment will constitute an offer, and each subsequent contact will be considered a new offer. A
20 federal case from Wisconsin involving an unexecuted partnership agreement is directly on point:
21 “[T]here was an ‘offer to sell’ in the statutory sense of the term, since § 551.02(11)(b) defines offer to
22

23 *MacCollum v. Perkinson*, 185 Ariz. 179, 186, 913 P.2d 1097, 1104 (App. 1896) (holding that the statutory definition of
24 a security for registration purposes is limited under A.R.S. § 44-1801(22) and the specified exemptions, but that the
“securities fraud statute . . . includes the sale of even those securities that are exempted from the registration
requirements.”).

25 ¹³³ See 15 U.S.C. § 77r(a)(1); A.R.S. 1843.02(D) (“Section 44-1842 applies to federal covered securities transactions
unless an exemption is available under another provision of this chapter.”).

26 ¹³⁴ A.R.S. § 44-1801(15).

¹³⁵ 15 U.S.C.A. § 72b(a)(3).

¹³⁶ Joseph C. Long, *Blue Sky Law* § 9.35 (citations omitted).

¹³⁷ *SEC v. Arvida Corp.*, 169 F. Supp. 211, 215 (S.D.N.Y. 1958).

1 sell as including a ‘solicitation of an offer to purchase.’ Such a solicitation occurred when the
2 defendants gave the plaintiff an unexecuted copy of the partnership agreement, implicitly inviting him
3 to return it completed as to form and amount in effect, inviting him to make an offer of purchase.”¹³⁸

4 As shown above, when discussing the OBP investment with MM, Steiner went well beyond
5 generating interest: he had discussed the investment opportunity in great detail with MM, gave her
6 wiring instructions, and then arranged a time for her to pay for the investment by check. He also
7 provided her with an Operating Agreement that described the investment in detail, showed a
8 \$250,000 purchase price for her investment, was signed by Steiner, and had a place for MM to
9 sign. Because of this detail, and because Steiner provided MM with written materials describing
10 the investment including the purchase price for MM’s membership interests, Steiner offered to sell
11 securities to MM.

12 **G. OBP and Steiner’s misuse of investor funds constitutes fraud.**

13 The Division alleged and established at hearing that Respondents violated the antifraud
14 provision of the Securities Act, A.R.S. § 44-1991. Under A.R.S. § 44-1991(A)(2), in connection with
15 the sale of securities, it is a fraud to “[m]ake any untrue statement of material fact, or omit to state
16 any material fact necessary in order to make the statements made, in the light of the circumstances
17 in which they were made, not misleading.”

18 The standard of materiality is whether a reasonable investor would have wanted to know the
19 omitted facts.¹³⁹ In the context of these provisions, the term “material” requires a showing of
20 substantial likelihood that, under all the circumstances, the misstated or omitted fact would have
21 assumed actual significance in the deliberations of a reasonable investor.¹⁴⁰ There is an affirmative
22 duty not to mislead potential investors in any way—a heavy burden on the offeror.
23 And the investor is not required to investigate or act with due diligence.¹⁴¹

24
25 ¹³⁸ *Feitler v. Midas Associates*, 418 F. Supp. 735, 738 (E.D. Wis. 1976).

26 ¹³⁹ *Rose v. Dobras*, 128 Ariz. 209, 214, 624 P.2d 887, 892 (App. 1981).

¹⁴⁰ *See Trimble v. American Sav. Life Ins. Co.*, 152 Ariz. 548, 553, 733 P.2d 1131, 1136 (1986) *citing Rose*, 128 Ariz. at 214, 624 P.2d at 892 (*quoting TSC Industries v. Northway, Inc.*, 426 U.S. 438 (1976)).

¹⁴¹ *Id.*

1 Additionally, a misrepresentation or omission of a material fact in the offer and sale of a
2 security is actionable even though it may be unintended or the falsity or misleading character of the
3 statement may be unknown. In other words, scienter or guilty knowledge is not an element of a
4 violation of A.R.S. § 44-1991.¹⁴² Stated differently, a seller of securities is strictly liable for any of
5 the misrepresentations or omissions he makes.¹⁴³ Unlike common law fraud, reliance upon a
6 misrepresentation is not an element in fraud involving the offer or sale of securities.¹⁴⁴

7 The evidence elicited at hearing clearly establishes that OBP and Steiner committed fraud in
8 connection with the offer or sale of the OBP investments by misusing investor funds. As noted
9 above, investors understood that their funds would be used only for development of the business.
10 They did not expect Steiner to take a salary, pay his related entities, or pay for personal expenses.
11 The Operating Agreements stated that OBP's manager would not receive compensation until OBP
12 generated revenues.

13 The evidence presented at hearing shows that, in spite of these representations and in spite
14 of OBP not generating any revenue, on several occasions Steiner made transfers of investor funds
15 to himself and to a related entity, Second Opinion Solutions. The Division showed that at the
16 beginning of a three-month span in fall 2010, OBP had almost no money in its bank accounts.
17 During the three month span, all deposits came from investor funds. At hearing, the Division's
18 accountant testified—and Steiner did not present any evidence to the contrary—that the majority of
19 funds from these investors did not go to the business. Rather, the funds went to pay for Steiner's
20 rent, were used to pay other investors, and went directly to Steiner and his entity Second Opinion
21 Solutions. Representing that investor funds would be used for one purpose, and then using them
22 for another is a material misrepresentation and constitutes fraud under the Securities Act.

23 **H. Respondents' failure to disclose the TC&D constitutes fraud.**
24

25 ¹⁴² See e.g. *State v. Gunnison*, 127 Ariz. 110, 113, 618 P.2d 604, 607 (1980).

26 ¹⁴³ See *Rose*, 128 Ariz. at 214, 624 P.2d at 892.

¹⁴⁴ *Id.*; see also *Aaron v. Fromkin*, 196 Ariz. 224, 227, 314 P.2d 1039, 1042 (App. 2000) (holding that "[t]he elements of securities fraud are articulated within the statute itself" and nothing in the language of the statute speaks of reliance.).

1 The evidence at hearing established that Steiner failed to disclose the TC&D to Ms. Flowers,
2 Mr. Flores, and Mr. Clay prior to their investing in OBP. Arizona case law establishes that the failure
3 to disclose the TC&D to offerees is a material omission that constitutes fraud. In *State ex rel Corbin*
4 *v. Goodrich*,¹⁴⁵ the Court of Appeals held that failure to disclose a previous cease and desist order
5 against company issued by Iowa securities regulator was a material omission constituting fraud under
6 the Securities Act. Other jurisdictions interpreting the identical language in the federal securities laws
7 have come to the same conclusion. For example, in *SEC v. Merchant Capital, LLC*, the Eleventh
8 Circuit held that “The existence of a state cease and desist order against identical instruments is clearly
9 relevant to a reasonable investor, who is naturally interested in whether management is following the
10 law in marketing the securities.”¹⁴⁶ And in *S.E.C. v. Levine*,¹⁴⁷ the D.C. District Court held that “It
11 cannot be disputed that a reasonable investor would want to know whether the person they are sending
12 their money to in order to purchase a stock has been previously found to have violated the securities
13 laws.”

14 Here, Steiner met with Flowers, Flores and Clay multiple times after the Division had filed his
15 TC&D. He failed to disclose the existence of the TC&D or inform these offerees of any government
16 investigation. All three persons purchased their OBP membership interests after the TC&D was filed.
17 As this is information that would be material to a reasonable investor, his failure to disclose violate
18 A.R.S. § 44-1991(A)(2).

19 **I. Steiner was the Controlling Person of OBP during the relevant timeframe.**

20 The Division alleged in the Notice and proved at hearing that Steiner was a controlling
21 person of OBP pursuant to A.R.S. § 44-1999(B). This provision provides that “Every person who,
22 directly or indirectly, controls any person liable for a violation of § 44-1991 or 44-1992 is liable
23 jointly and severally with and to the same extent as the controlled person to any person to whom
24 the controlled person is liable unless the controlling person acted in good faith and did not directly
25 or indirectly induce the act underlying the action.” The Securities Act “attaches vicarious or

26 ¹⁴⁵ 151 Ariz. 118, 124, 726 P.2d 215, 221 (App. 1986).

¹⁴⁶ 483 F.3d 747, 771 (11th Cir. 2007).

¹⁴⁷ 671 F. Supp. 2d 14, 27-28 (D.D.C. 2009).

1 secondary liability to ‘controlling persons’ as it does to a person or entity that commits a primary
 2 violation of §§ 44–1991 or 1992.”¹⁴⁸ As the Arizona Court of Appeals stated in *Eastern Vanguard*
 3 *Forex Ltd. v. Ariz. Corp. Com’n*, Arizona follows the SEC definition of “control” which is “the
 4 possession, direct or indirect, of the power to direct or cause the direction of the management and
 5 policies of a person, whether through the ownership of voting securities, by contract, or
 6 otherwise.”¹⁴⁹

7 Here, Steiner directly induced all acts of OBP, the entity issuing the securities. As noted
 8 above, the Division established at hearing that Steiner is a manager of OBP, a manager-managed
 9 LLC. Steiner performed all managerial functions for OBP, including: (1) locating and
 10 communicating with potential investors; (2) exercising sole control over OBP’s bank accounts; (3)
 11 exercising control over investor funds; (4) signing investors’ investment documents on behalf of
 12 OBP; (5) giving updates to investors; and (6) negotiating and entering agreements on OBP’s
 13 behalf, including the PPA with Lunsford Consulting.

14 Steiner clearly had the power to control and manage OBP, and did in fact manage and
 15 control it during the relevant timeframe, while OBP sold securities and was actively conducting
 16 business. Thus, Steiner is jointly and severally liable with OBP for the violations of the Securities
 17 Act described in this Brief.

18 **J. All restitution and penalties are an obligation of Steiner and Respondent Spouse’s**
 19 **marital community**

20 Pursuant to A.R.S. § 25-211, all property acquired by either husband or wife during the
 21 marriage is the community property of the husband and wife except for property that is acquired
 22 by gift, devise, descent or is acquired after service of a petition for dissolution of marriage, legal
 23 separation or annulment if the petition results in a decree of dissolution of marriage, legal
 24 separation or annulment. During marriage, “the spouses have equal management, control and
 25 disposition rights over their community property and have equal power to bind the

26 ¹⁴⁸ *Facciola v. Greenberg Traurig, LLP*, 781 F. Supp. 2d 913, 922-23 (D. Ariz. 2011); *see also Eastern Vanguard*
Forex Ltd. v. Ariz. Corp. Com’n, 206 Ariz. 399, 412, 79 P.3d 86, 89 (App. 2003).

¹⁴⁹ 206 Ariz. at 412, 79 P.3d at 89.

community.”¹⁵⁰ In addition, “..., either spouse may contract debts and otherwise act for the benefit of the community”¹⁵¹ “(T)he presumption of law is, in the absence of the contrary showing, that all property acquired and all business done and transacted during coverture, by either spouse, is for the community.”¹⁵²

First, Steiner and Respondent Spouse admitted that they were married at the time of the sales of the OTB limited liability interests. Second, Steiner and Respondent Spouse failed to rebut the presumption that a debt incurred during marriage is a community obligation. The Arizona Court of Appeals has stated, “[a] debt incurred by a spouse during marriage is presumed to be a community obligation; a party contesting the community nature of a debt bears the burden of overcoming that presumption by clear and convincing evidence.”¹⁵³ Furthermore, “... a debt is incurred at the time of the actions that give rise to the debt.”¹⁵⁴ Here, the actions giving rise to the debt occurred while Steiner was married. Therefore, the debt was incurred during marriage and is presumed to be a community debt. Since Steiner and Respondent Spouse failed to overcome this presumption, the debt remains a liability of their marital community.

Based on the foregoing, the restitution and administrative penalty is a community debt. The Commission need not determine whether the Respondent Spouse had knowledge, participation, or intent in order to bind the community for the debt incurred. The presumption of intent is enough to bind the community, even if the Respondent Spouse was unaware or did not approve of their participant spouses’ actions. In *Ellsworth v. Ellsworth*, the appellate court stated, “[I]f the husband acts with the object of benefiting the community, a fact not questioned here, the obligations so incurred by him are community in nature, whether or not the wife approved thereof.”¹⁵⁵ Since Steiner and Respondent Spouse failed to meet their burden and present “highly probable” evidence to rebut the presumptions, the debts are liabilities of their

¹⁵⁰ A.R.S. § 25-214(B).

¹⁵¹ A.R.S. § 25-215(D).

¹⁵² *Johnson v. Johnson*, 131 Ariz. 38, 45, 638 P.2d 705, 712 (1981) (emphasis added).

¹⁵³ *Hrudka v. Hrudka*, 186 Ariz. 84, 91, 919 P.2d 179, 186 (Ct. App. 1995).

¹⁵⁴ *Arab Monetary Fund v. Hashim*, 219 Ariz. 108, 111, 193 P.3d 802, 806 (Ct. App. 2008).

¹⁵⁵ 5 Ariz. App. 89, 92, 423 P.2d 364, 367 (Ct. App. 1967), citing *Donato v. Fishburn*, 90 Ariz. 210, 367 P.2d 245 (1961).

1 respective marital communities.¹⁵⁶ Therefore, the marital community of Steiner and Respondent
2 Spouse are subject to any order of restitution, administrative penalties, or other appropriate
3 affirmative relief.¹⁵⁷

4 **K. Numerous offers and sales of the securities.**

5 The final consideration is the number of violations of the Securities Act by Respondents, and
6 the penalty that should be issued. In assessing the administrative penalty, "each violation" carries a
7 penalty, per A.R.S. § 44-2036: an assessment of an administrative penalty may be assessed "in an
8 amount not to exceed five thousand dollars for each violation." Pursuant to A.R.S. § 44-1841(A),
9 each offer and sale by Respondents was a violation of the Securities Act. As that statute provides: "It
10 is unlawful to *sell or offer for sale* within or from this state any securities unless the securities have
11 been registered...." (emphasis added). Similarly, A.R.S. § 44-1842 provides that "It is unlawful for
12 any dealer to *sell* or purchase or *offer to sell* or buy any securities, or for any salesman *to sell or offer*
13 *for sale* any securities within or from this state unless the dealer or salesman is registered...."
14 (emphasis added).

15 The evidence established that OBP, via its manager Steiner, offered and sold investments to 35
16 of the 37 investors listed in Exhibit S-19 (two membership interest owners received their investment
17 as a gift from another investor). This is a total of 70 violations of the registration provisions of the
18 Securities Act. The evidence showed that OBP offered and sold investments to two additional
19 investors, who received a return of their investment; this amounts to four additional violations.
20 Finally, OBP offered securities to MM. This adds up to 38 offers and 37 sales, 75 total.

21 Additionally, as shown above, each offer and sale involved fraud. Thus OBP and Steiner
22 committed 75 violations of A.R.S. § 44-1991.

23 Minimally, OBP and Steiner as the control person of OBP should be ordered pay an
24 administrative penalty in the amount of \$50,000. Given that the Commission could issue a \$5,000
25 fine for the 75 total violations of the registration provisions and another \$5,000 for each fraud in
26

¹⁵⁶ See A.R.S. § 25-215.

¹⁵⁷ *Id.*

1 connection with the offer and sale of each security, this is substantially less than the maximum penalty
2 that the Commission is authorized to issue.

3 The Securities Act also provides a remedy of restitution, found in A.R.S. § 44-2032(1).
4 Investors paid OBP, Steiner or an entity controlled by Steiner a total of \$2,495,500.

5 Notably, at no time prior to the hearing did Steiner provide any evidence showing payments to
6 any of these investors for whom the Division is seeking restitution.¹⁵⁸

7 CONCLUSION

8 The evidence produced at hearing establishes the following:

9 A. OBP offered unregistered securities in the form of investment contracts within or
10 from Arizona to 38 offerees;

11 B. OBP sold unregistered securities in the form of investment contracts through
12 unregistered dealers or salesmen in or from Arizona to 37 investors, 35 of which have not received
13 any return of their principal; the 35 persons' principal totals \$2,495,400;

14 C. Every offer and sale of the unregistered securities included fraud in connection with
15 the offer and sale of securities by all Respondents;

16 D. Steiner was the control person for OBP and as such is jointly and severally liable
17 with OBP for the restitution and penalties ordered against OBP.

18 Based upon the evidence admitted during the administrative hearing, the Division
19 respectfully requests this tribunal to:

20 1. Order Respondents and the marital community of Steiner and Respondent Spouse to
21 jointly and severally pay restitution in the amount of \$2,495,500, plus interest from the date
22 judgment is entered in this matter to the date of repayment (interest rate to be calculated at the time
23 of judgment under A.R.S. § 44-1201);

24 2. Order Respondents and the marital community of Steiner and Respondent Spouse to
25 pay an administrative penalty of not more than \$5,000 for each violation of the Act, as the Court
26


¹⁵⁸ See A.A.C. R14-4-308(C).

1 deems just and proper, pursuant to A.R.S. § 44-2036(A). The Division recommends that OBP,
2 Steiner, and Steiner and Respondent Spouse's marital community jointly and severally pay an
3 administrative penalty in the amount of \$50,000.

4 3. Order Respondents to cease and desist from further violations of the Act pursuant to
5 A.R.S. § 44-2032.

6 4. Order any other relief this tribunal deems appropriate or just.

7
8 RESPECTFULLY SUBMITTED June 23, 2014.

9 
10 Ryan J. Millecam
11 Attorney for the Securities Division of the
12 Arizona Corporation Commission
13
14
15
16
17
18
19
20
21
22
23
24
25
26

1 ORIGINAL AND EIGHT (8) COPIES of the foregoing
2 filed this 23rd day of June, 2014, with:

3 Docket Control
4 Arizona Corporation Commission
1200 W. Washington St.
Phoenix, AZ 85007

5 COPY of the foregoing mailed
6 this 23rd day of June, 2014, to:

7 Arthur P. Allsworth, Esq.
8 1001 N. Central Ave., Suite 701
Phoenix AZ 85004-1948

9 *Attorney for Respondents*

10 By: